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July 28, 2015

Via ECF Filing

The Honorable Haywood S. Gilliam, Jr.
U.S. District Court, Northern District of California
Courtroom 15
450 Golden Gate Avenue
San Francisco, California 94102

**Re: Neil A. Jensen vs. BNSF Railway Company
Case No. 3:13-cv-05955-HSG**

Dear Judge Gilliam:

During oral argument on July 9, 2015, Plaintiff's counsel stated that Dr. Galli prepared the letter (and Plaintiff's counsel did not) dated December 20, 2011, which Plaintiff submitted in opposition to BNSF's Motion for Summary Judgment. (*See* Pl.'s Opp., Exh. H.). Plaintiff's counsel's statement was inaccurate.

BNSF submits three facsimiles from Plaintiff's counsel and one from Dr. Galli, showing that the December 20, 2011 letter was written by Plaintiff's counsel, not Dr. Galli. BNSF submits these documents at this time because BNSF did not anticipate that Plaintiff's counsel would misrepresent the origin of the December 20, 2011 letter at oral argument. In the interests of justice, BNSF humbly requests that the Court accept the attached documents in further support of its Motion. (*See* Civil L.R. 7-3).

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On November 17, 2011, Plaintiff's counsel faxed a copy of the letter in final form to Dr. Galli for his signature. (*See* Exh. 42).¹ ("[T]he enclosed letter has been drafted for your review, approval, and signature."). This November 17, 2011 letter is identical to the December 20, 2011 letter in every way. On November 28, 2011, Plaintiff's counsel sent a follow-up fax to Dr. Galli. (*See* Exh. 43). The November 28, 2011 letter is identical to the December 20, 2011 letter in every way. On December 20, 2011 Plaintiff's counsel faxed a third copy of the letter adding "Please see the enclosed letter for Dr. Galli to read & sign, it's even on his letterhead to save time (hopefully)!" (*See* Exh. 44).

On December 27, 2011, Dr. Galli signed Plaintiff's counsel's letter and returned it without any changes. (*See* Exh. 45). It is important to note that Plaintiff's opposition falsely claims Dr. Galli sent the letter to BNSF seven days earlier. (*See* Opp. at p. 11) ("On December 20, 2011, Dr. Galli sent a letter to BNSF HR director George Hill and attorney Andrea Hyatt reiterating Jensen required 3-8 days off per month solely and specifically to rest his wrist."). This is, of course, impossible because Dr. Galli had not even signed the letter yet.

Dr. Galli testified that he did not know who wrote the December 20, 2011 letter, or how he had received it before signing it. (*See* BNSF Reply at Sec. III (A)(4)). But, Dr. Galli testified that signing such a letter at an attorney's request was *against his own practices*. Dr. Galli testified:

Q. And if the attorney came to you and said I need you to prescribe three to eight days off per month for my client, you would refuse that request?

A. Well, if an attorney sent a letter and had requested something like that, then what would be done is, first of all, a prescription wouldn't just be written for a work restriction of that nature. The patient would be called back in and it would have to be discussed with the patient.

Q. Did that happen here?

A. No.

Q. Are you sure of that?

¹ All exhibit number citations are to the June 11, 2015 and July 28, 2015 Declaration of Steven S. Vahidi.



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A. That's not something that I do. I don't fold to wishes of either - - I went into medicine to practice the medicine. So, therefore, I simply treat my patient. And what I do may not be liked by an insurance company or by an employer or by a patient's attorney. But, it doesn't influence, I simply practice medicine that needs to be done to make the patient better.

(Exh. 39 at 58:17-59:9)

Accordingly, because the December 20, 2011 letter was not prepared by Dr. Galli and was instead written by Plaintiff's counsel, the letter is not a valid treatment plan under the FRSA because Section 20109(c)(2) protects treatment plans by physicians, not attorneys.²

Respectfully Submitted,

YUKEVICH | CAVANAUGH

/s/ Steven S. Vahidi

² Plaintiff claims that the December 20, 2011 letter is a valid treatment plan under Section 20109(c)(2).² (See Pl.'s Opp. at p. 11 and Exh. H.).